

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 * * *

4 ROBERT HOLMES III,

Case No. 2:15-cv-02176-APG-CWH

5 Petitioner,

ORDER

6 v.

7 BRIAN WILLIAMS,

8 Respondent.

9 Petitioner Robert Holmes III has submitted a *pro se* petition for writ of habeas
10 corpus pursuant to 28 U.S.C. § 2254. Before the court is Holmes' response to this
11 court's order to show cause that the petition should not be dismissed without prejudice
12 as unexhausted (Dkt. #3).

13 Since the time of this court's show-cause order, the court has ascertained from
14 the docket that Holmes has previously filed at least one federal habeas petition
15 challenging this same judgment of conviction, C2287852. 28 U.S.C. § 2244(3)(A)
16 provides: "[b]efore a second or successive application permitted by this section is filed
17 in the district court, the applicant shall move in the appropriate court of appeals for an
18 order authorizing the district court to consider the application." Where a petition has
19 been dismissed with prejudice as untimely or because of procedural default, the
20 dismissal constitutes a disposition on the merits and renders a subsequent petition
21 second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d
22 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir.
23 2005).

24 On July 5, 2013, the habeas petition in case no. 2:12-cv-00013-JCM-GWF was
25 dismissed with prejudice as untimely, and judgment was entered (2:12-cv-00013-JCM-
26 GWF, Dkt. #s 14, 15). The instant petition is, therefore, a successive petition, which
27 requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeals to
28 pursue. See 28 U.S.C. § 2244(b)(3) et seq.

1 In the response to the show-cause order, Holmes argued only that he has newly
2 discovered evidence of his actual innocence. Holmes has not presented this court with
3 proof that he has obtained leave to file a successive petition from the Court of Appeals.
4 Moreover, petitioner is well-acquainted with the requirement of obtaining leave with the
5 appeals court to file a successive petition. See, e.g., 2:15-cv-001755-GMN-GWF.
6 Accordingly, Holmes' petition is dismissed with prejudice as successive.

7 **IT IS THEREFORE ORDERED** that the Clerk shall detach and file the petition
8 (Dkt. #1-1).

9 **IT IS FURTHER ORDERED** that the petition is **DISMISSED** with prejudice as
10 successive.

11 **IT IS FURTHER ORDERED** that the Clerk shall add Adam Paul Laxalt, Nevada
12 Attorney General, as counsel for respondents.

13 **IT IS FURTHER ORDERED** that the Clerk shall electronically serve the petition,
14 along with a copy of this order, on respondents. No response by respondents is
15 necessary.

16 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and
17 close this case.

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19 DATED: 14 April 2016.

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23 ANDREW P. GORDON
24 UNITED STATES DISTRICT JUDGE
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